23969

OFFICE SUPREME COURT of U. S.
RECEIVED
APR 27 1903

In the Supreme Court of the United States at Washington, D. C.

OCTOBER TERM, 1902.

No. 209.

STATE OF TENNESSEE, ON RELATION OF C. L. MALONEY, et al.

vs.

STEPHEN F. CONDON, et al.

PETITION TO REHEAR AND MOTION TO REVIVE.

In the Supreme Court of the United States at Washington, D. C.

OCTOBER TERM, 1902.

No. 209.

STATE OF TENNESSEE, ON RELATION OF G. L. MALONEY, et al.

vs.

STEPHEN P. CONDON, et al.

PETITION TO REHEAR AND MOTION TO REVIVE.

Your petitioners, the Plaintiffs in Error and Relators in the above styled cause, respectfully show unto Your Honors that they are greatly aggrieved by the opinion and decree of this Honorable Court, rendered herein on the 6th day of April, 1903, dismissing their writ of error upon the ground that the terms of office of the Relators and of the Defendants had expired before the hearing of this cause in this Court.

Petitioners respectfully represent and insist that the said opinion and decree of the Court heretofore rendered is erroneous, and should be recalled, and this cause considered and determined upon the merits.

The question upon which the Court's decision, dismissing writ of error, is based, was brought to the attention of counsel for the Petitioners and Relators, for

the first time, on the day of the argument of the cause. Brief on behalf of the Defendants had not been filed within the time required by the rules, and had not reached counsel for the Petitioners and Relators in time to admit of reply by brief.

Petitioners respectfully submit that said opinion and decree are erroneous, for the following reasons:

I.

The terms of office of the Relators had not expired, if the statute under which the Defendants were appointed and some of them subsequently elected, is unconstitutional and void under the 14th Amendment to the Federal Constitution. No appointment or election under that statute could have the effect to displace Relators, if the statute is unconstitutional and void. In that event, the Petitioners and Relators held over under an explicit provision of the Constitution of the State of Tennessee.

That provision of the State Constitution is in these words: "Every officer shall hold his office until his successor is elected or appointed and qualified."

Art. 7, Sec. 5 of the State Constitution.
Shannon's Code, Page 75.

This provision of the State Constitution was not brought to the attention of the Court on the original hearing.

A statute void for unconstitutionality cannot affect the rights of anyone. Hence it is necessary to determine whether the statute involved is or is not constitutional before it can be held that the Relators' terms of office had expired. Besides, this proceeding is of a public character, and prosecuted in the public interest by the public prosecutor, and survives the death or expiration of the private rights of Relators. It is not prosecuted solely for ouster of Defendants.

II.

This cause should not fail by reason of the expiration of the provisional title of the Defendants, which was conferred by their appointment by the Governor under the statute, to hold until the next general election.

This suit, while brought on the relation of citizens, as is permitted by staute, is brought and prosecuted by the public prosecutor, as is likewise required by statute. The original bill or petition is signed by the Attorney-General of the circuit.

Shannon's Code, Sects. 5168-69.

"Any person" under the statute may be Relator. The primary purpose of a suit in a case like this is to oust the person unlawfully holding a public office, in the interest of the public.

Shannon's Code, Sec. 5165.

It is allowable, however, if the Relator happens to be a person entitled to the usurped office, for the Court to determine his right to the office and pronounce judgment in his favor. And in such a case "the Court may order the Defendant to deliver to him, upon his qualifying as required by law, all books and papers belonging to the office in his (Defendant's) custody or under his control, and such claimant may thereupon proceed to exercise the functions of the office."

Shannon's Code, Sects. 5175-6.

Thus it appears that this is a proceeding of a public nature, and that the relief granted to the Relator, who is entitled to the office, is incidental and for the public benefit, as well as that of the Relator.

It is likewise a proceeding to restore the books and papers of public office to the proper custodian. So much for the nature of the proceeding.

Petitioners aver, in this connection, that the Defendant, Stephen P. Condon, who was originally ap-

pointed Chairman of the Road Commission of Knox County, was at the election provided by said Act, in August, 1902, elected to said office, and has held the same ever since, and is holding the same at this time; and that the Defendant, H. C. Anderson, is still holding the position of Superintendent of the Workhouse of Knox County, under and by virtue of appointment under said statute. They aver further that the Defendants, R. W. Parker and Fletcher Adams, were, at said August election, 1902, elected under the provisions of said Act as members of said Road Commission in lieu of the Defendants, T. T. McMillan and James Rich, and they aver that all of said parties are at this time in possession of said offices and the books and papers pertaining thereto, and withholding the same from petitioners.

For the foregoing reasons petitioners pray that the former opinion and decree of this Court herein be recalled, and that this cause be determined upon its merits; and for this purpose they ask that the cause be continued against said Condon and Anderson, who are still holding the same offices that they held at the institution of this suit, however, under a title by election, in lieu of an appointment, under said invalid statute, and that the same be revived against said Parker and Adams, in order that an effectual decree may be rendered herein. They pray also for general relief.

Copy of this petition and notice of its presentation has been served upon each of the Defendants, and also on their counsel.

State of Tennessee,

County of Knox.

Personally appeared before the undersigned authority, G. W. Pickle, and made oath in due form of law, that the facts stated in the foregoing petition are true,

and that he is counsel for the petitioners and personally cognizant of the facts stated. G. W. PICKLE.

Sworn to and subscribed before me, this April 22, 1903. W. T. KENNERLY,
Notary Public Knox Co., Tenn.

G. W. Pickle, one of the counsel for the Petitioners and Relators in the above styled cause, certifies that the foregoing petition is filed in good faith, and that in his opinion it is based upon good and sufficient grounds.

This April 22, 1903.

G. W. PICKLE,
Counsel for the Petitioners,
G. L. Malone, et al.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

STATE OF TENNESSEE, EX REL. MALONEY, et al.

vs.

STEPHEN P. CONDON, et al.

No. 209.

BRIEF ON PETITION TO REHEAR AND REVIVE FILED BY THE RELATORS.

In support of their petition the Relators rely upon the following propositions and authorities:

I.

The expiration of the terms of office, for which the Relators had been elected, before the hearing in this Court, should not operate to prevent a decision in this cause upon the merits.

In the first place, the terms of office of the Relators have not expired, if the statute under which the Defendants were originally appointed, and some of them since elected to office, is unconstitutional and void. In such event the "successors" of Relators in their respective offices have not been *elected* or *qualified*, and the constitution of the State provides that "every officer shall hold his office until his successor is elected or appointed and qualified."

Constitution, Article VII, Sec. 5.
Shannon's Code, page 75.

Under this clause of the constitution it is held that a Clerk and Master, an appointive officer, holds over until his successor is appointed and qualified.

In the Matter of R. M. Baldwin, 7 Heis., 416.

And under this and similar provisions it has been held that public officers cannot denude themselves of the duties of their offices until their successors have been elected and qualified, where the rights of third persons were involved.

U. S. vs. Justices, 10 Fed. Rep., 460.
Badger vs. U. S., 93 U. S., 599.

Again, it is held that in a proceeding of this character, so far as it seeks to oust the usurper of a public office, judgment of ouster will be entered, notwithstanding the expiration of the term of the Relator.

Commonwealth vs. Swasey, 133 Mass., 540.
Hammer vs. State, 44 N. J. Law, 667.
People vs. Loomis, 8 Wend. (N. Y.), 396.
Roane vs. Matthews, 75 Miss., 94.

Conceding, however, that the case should be dismissed where the Relator's term of office expires while the suit is pending, and that the Court will not pronounce judgment for costs in such case, still if other relief, such as a fine or damages, or of like character is sought, then the Court will retain the case and pronounce judgment upon the merits. It is only where the case is for ouster and costs only that the Courts have dismissed on account of the expiration of the Relator's term.

Under the statute pursuant to which this proceeding was brought, the Relator is entitled, in addition to the judgment of ouster, to a judgment for the delivery to him of the books and papers belonging to the office that are in the Defendant's possession. The ouster, therefore, is not the sole object of the proceeding in this case under the statute, and therefore the case does not abate upon the expiration of the Relators' terms of office.

See cases cited in Note to 23 A. & E. Encl. Law (2nd Ed.) page 633.

But it is clear, under the statutes of Tennessee, that this case does not abate upon the expiration of the term of office, so far as it seeks ouster of the Defendants. It is proper to notice, in this connection, the scope and purpose of the Tennessee statute. The only purpose and scope of the writ of *quo warranto* at common law in cases of this character was to oust the usurper from his office. The Tennessee statute embraces every case falling within the ancient writ of *quo warranto*, and provides in addition for other relief, to-wit, that the Relator may have his right to the office declared and enforced in the same proceeding, and the books of the office delivered to him by the unsuccessful Defendant.

Shannon's Code, Sec.

The proceeding under this statute is of a public character, and whether it is instituted by direction of the General Assembly, or of the Governor and Attorney-General, or upon the information of a private person, in every case it must be brought by consent of the Public Prosecutor.

State vs. Johnson, 8 Lea, 74.
State vs. McConnell, 3 Lea, 338-40.
State ex rel. vs. Agee, 105, Tenn., 588.
State vs. Turnpike Co., 3 Tenn., Chancery, 166-7.

And even where suit is brought on the relation of a private person, it remains under the control of the Public Prosecutor.

State ex rel. vs. Agee, 105, Tenn., 588.

This suit was brought by the Public Prosecutor, the District Attorney, and is therefore a suit for a public purpose. Perhaps in the original brief, counsel placed too much stress upon the rights of the Relators, and did not emphasize as much as he should the public character of the proceeding.

The provision of the statute under consideration to the effect that upon the death of the Relator the suit does not abate, but may be revived in the name of any other person who desires to be substituted and become liable for the prosecution of the suit, is conclusive, it would seem, that the suit is not dependent for its continuance upon the Relator's term of office.

Shannon's Code, Sec. 5184.

Certain it is that the death of the Relator would terminate his right to hold the office, but it would not end the suit. The suit may continue for the public interest.

There is, besides, a general provision made by statute in Tennessee against the abatement of suits on account of transfer of interest or other cause.

Shannon's Code, Sec. 4568.

It should be borne in mind that the proceeding under this statute differs most materially from contests over an election. There are provisions made for the contesting of elections in Tennessee, but it is expressly provided that the validity of elections, that may be contested otherwise, cannot be contested under the provisions of this particular statute.

Shannon's Code, Sec. 5179.

A contested election is a private suit under the Tennessee decisions, and involves only private rights. This proceeding is brought under a different statute, and is of a public character, brought and controlled by the public prosecutor.

State vs. McConnell, 3 Lea, 335, 337.
Boring vs. Griffith, 1 Heisk, 456.
State vs. Johnson, 8 Lea, 74.
State ex rel. vs. Agee, 105 Tenn., 588.

There is no analogy between a contested election case and cases in the nature of *quo warranto*, brought under this statute. The cases of *Mills vs. Green, 159 U. S., 651*, and *Boring vs. Griffith, 1 Heisk., 457*, were

causes involving individual, not public, rights, and were prosecuted by private parties, not the public prosecutor. The private rights involved in these cases expired before the cases were decided, and there being no public interest involved, the cases necessarily abated. There are both public and private interests involved in this case. The Relators have, moreover, a "hold-over" right to their offices.

II.

The Relators should not be denied relief in this case because of the fact that the terms of office to which the Defendants were appointed have expired. There is no suggestion of this fact in the record. It can only be inferred from the terms of the statute. The Defendants have not suggested otherwise than in their brief that they are not still holding the offices, under this statute, either by appointment or by election. The fact is now brought to the attention of the Court for the first time in the petition to rehear and revive, which has been served upon the parties and their counsel, and answer invited, that the Defendant, Stephen P. Condon, holds by election under said statute, characterized by the grossest and most shameless frauds and disregard of law, the same office to which he had been appointed by the Governor, and the Defendant, H. C. Anderson, holds under said statute the same office and by the same title that he held it at the commencement of the suit. They are therefore still usurping the offices, if the statute is void, and wrongfully withholding them and the books and the papers of the offices from the Relators. Their title by election is no better than their title by appointment under this void statute.

As to the other Defendants, if their presence before the Court is material, the cause should be revived against them. See Shannon's Code, Sec. 4568. If

23975

this cannot be done, then it would be impossible for the Relators ever to obtain a remedy. Supposing them to hold over for two years, as they undoubtedly have done, if the statute in question is void, the Defendants, if a new suit must be brought upon each election of new officers, under the statute, can prolong the litigation in each new case, until their terms have expired, so that it would be practically impossible ever to prosecute a suit to a termination before the particular term of office had expired, and this statute, however void, might in that way be operative perpetually.

Respectfully submitted,

G. W. PICKLE,
J. W. GREEN,
Solicitors for Relators.